RECORD
AND
BRIEFS

No. 10-1491

IN THE
Supreme Court of the United States

ESTHER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINAM KIOBEL, *et al.*,
Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC, SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF RESPONDENTS ON REARGUMENT

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QUESTION PRESENTED

Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.

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INTERESTS OF *AMICI CURIAE*

WLF is a public interest law and policy center that devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government.[1] In particular, WLF has devoted substantial resources over the years to opposing litigation designed to create private rights of action under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, because such litigation generally seeks (inappropriately, in WLF's view) to incorporate large swaths of allegedly customary international law into the domestic law of the United States. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Rio Tinto, PLC v. Sarei*, No. 11-649 (cert. petition filed Nov. 23, 2011).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici agree with this Court's view, expressed in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that a decision to create a private right of action is one best left to legislative judgment. Congress has given no indication that it authorized the federal courts to create

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Counsel for the parties have provided blanket consent for the filing of *amicus* briefs in support of either party, as indicated in letters they lodged with the Clerk.

a private right of action for violations of the law of nations alleged to have occurred in foreign countries. Absent any such indication, *amici* oppose efforts to apply the ATS extraterritorially.

Amici are also concerned that an overly expansive interpretation of the ATS threatens to undermine American foreign and domestic policy interests. By exercising ATS jurisdiction over events taking place in foreign countries whose courts often have a much greater stake in those events than do American courts, the federal court are risking the creation of considerable conflict between the United States and those foreign countries – and they are doing so in the absence of any clear indication from Congress that it approves of such litigation.

STATEMENT OF THE CASE

Petitioners Esther Kiobel, *et al.* (collectively, "Kiobel"), are citizens of Nigeria who claim to have been injured in Nigeria as a result of human rights violations committed by the Nigerian government. They allege that Nigeria's actions amounted to torture, extra-judicial execution, prolonged arbitrary detention, and crimes against humanity. Kiobel filed suit in federal court in 2002 against Respondents (three non-U.S. corporations), invoking the court's jurisdiction under the ATS. Kiobel alleged that Respondents, while doing business in Nigeria, aided and abetted the human rights violations. She did not allege that any portion of the violations occurred in the United States.

On review of a district court order granting in

part Respondents' Rule 12(b) motion to dismiss, the Second Circuit held unanimously that the amended complaint should be dismissed – albeit the panel majority and Judge Leval (concurring in the judgment) disagreed regarding the appropriate basis for dismissal. Pet. App. A. Following this Court's grant of review and an initial round of briefing, the Court requested supplemental briefing on an additional issue: whether and under what circumstances the ATS "allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."

SUMMARY OF ARGUMENT

The ATS, adopted in 1789, provides that a district court shall have original jurisdiction over civil actions "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The ATS is a "strictly jurisdictional" statute; it contains no language "creat[ing] a statutory cause of action." *Sosa*, 542 U.S. at 713. There is a strong presumption, even with respect to an express cause of action, against extending it to encompass conduct in a foreign territory. That presumption should apply even more strongly when, as here, causes of action exist only because *Sosa* interpreted the ATS as expressing an *implied* congressional intent to authorize suits by aliens alleging violations of one of the three offenses against the law of nations identified by Blackstone. In the absence of anything in the language or history of the ATS suggesting that Congress affirmatively desired that the ATS should apply to conduct in a foreign territory, the presumption has not been overcome – and the efforts of

Nigerian citizens to apply the ATS to activities that took place in Nigeria should be rejected. Indeed, the history preceding adoption of the ATS as well as the foreign policy concerns of 18th century American leaders strongly supports the view that Congress did *not* intend the ATS to have extraterritorial application.

In support of her argument to the contrary, Kiobel relies on a 1795 opinion issued by Attorney General William Bradford, asserting, "Bradford found that a foreign plaintiff could bring tort claims under the ATS against perpetrators of an attack within the territory of the British colony of Sierra Leone." Pet. Supp. Br. 31. That assertion is based on a misunderstanding of the law of nations as understood in the 18th century. Although several American citizens were alleged to have "plundered" the colony, no 18th century scholar would have understood the on-shore attack to have constituted a violation of the law of nations. Accordingly, Bradford's conclusion that English citizen could sue in federal court under the ATS must have been based on allegations that the Americans also attacked British ships on the high seas off the coast of Sierra Leone. As alleged by the British themselves, those attacks likely constituted piracy, which was universally considered a violation of the law of nations.

The principal foreign policy concerns of the Washington Administration were maintaining neutrality in the numerous European wars and avoiding actions that would offend any European powers and thereby cause one of them to declare war on the fledgling United States. Providing a cause of action for offenses against the law of nations that occurred within

the United States served those goals. Providing a cause of action for offenses that occurred *within the jurisdiction of another sovereign* would likely have had precisely the opposite effect. The other nation could well resent an American court meddling in its affairs by exercising jurisdiction over – and applying U.S. law to – events that occurred within the other nation. Such resentment was a particular risk if the subject matter of the suit was an alleged violation of the law of nations. It is not difficult to imagine, for example, that the French would resent an American court sitting in judgment regarding whether the safe-conduct rights of an Englishman were insufficiently protected while he traveled through France.

Moreover, leading 18th century legal scholars, including both Blackstone and Vattel, expressed no support for extraterritorial enforcement of the law of nations. In support of his enumeration of three offenses against the law of nations, Blackstone cited British statutes that prohibited: (1) violations of safe conducts; (2) interference with the rights of ambassadors; and (3) piracy. Importantly, the geographic scope of each of the cited statutes was expressly limited; none was applicable to events taking place within the territory of another sovereign. Nor is there record of any English court adjudicating an alleged law-of-nations offense that was alleged to have occurred within a foreign nation.

The law of nations in the 18th century focused primarily on the relations between nations and how they ought to behave toward one another. In identifying three methods by which individuals could violate the law of nations, Blackstone was not seeking to single out

the very worst offenses that an individual might commit; *e.g.*, murder did not make it onto the list. Rather, he was seeking to identify offenses likely to have the greatest impact on relations between nations, and to encourage nations to provide remedies for those offenses as a means of maintaining international peace. Applying Blackstone's rationale, the 1789 Congress could not have intended the implied ATS causes of action to be applied extraterritorially, because doing so would undermine the purposes sought to be served by recognition of the three 18th century law-of-nations offenses.

ARGUMENT

I. CONGRESS INTENDED TO IMPOSE TERRITORIAL LIMITS ON ATS CAUSES OF ACTION

This Court held in *Sosa* that the ATS is a "strictly jurisdictional" statute; it contains no language "creat[ing] a statutory cause of action. *Sosa*, 542 U.S. at 713. It grants federal district courts jurisdiction to hear tort claims filed by aliens alleging violations of the law of nations but is silent regarding whether and when federal courts should recognize such claims. Rather, *Sosa* explained, Congress bears principal responsibility for determining what causes of action aliens may file. *Id.* at 727.[2] While *Sosa* held open the possibility that

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[2] Congress periodically has exercised that power. For example, the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 *note*, provides a right of action against any "individual" who, under color of foreign law, subjects another individual to "torture" or "extrajudicial killing."

there *may* exist federal common law rights of action over which courts may exercise ATS jurisdiction (in addition to three common law rights of action generally recognized at the time of the ATS's adoption in 1789), it held that federal courts should exercise "great caution" in recognizing any such rights. *Id.* at 728. It held that "judicial caution" was particularly warranted before recognizing a right of action based on activities that take place overseas, in light of "the possible consequences of making international rules privately actionable." *Id.* at 727.[3]

Sosa's admonition that courts exercise "great caution" before recognizing ATS rights of action is particularly apt with respect to the extraterritoriality issue raised in this case. *Sosa*'s fear of "adverse foreign policy consequences" is well founded whenever courts are considering recognition of a cause of action based on events that took place within the territory of another

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[3] The Court expressed particular concern over extraterritorial application of the ATS when the conduct of a foreign government was at issue:

> It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agents has transgressed those limits. . . . Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, *if at all*, with great caution.

Id. at 727-28 (emphasis added).

nation. It is precisely such fears that has led the Court to create a strong presumption "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). As the Court has explained, "Foreign conduct is generally the domain of foreign law," and "courts should assume that legislators take account of the legitimate sovereign interests of other nations when they write American law." *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007).

Kiobel argues that this presumption against extraterritoriality does not apply here because the ATS is a jurisdictional statute. Pet. Supp. Br. 34-35. But the scope of the ATS's jurisdictional grant is not the principal focus of the supplemental briefing. Rather, the Court's Question Presented focuses on the scope of the causes of action Congress impliedly permitted federal courts to craft under the ATS: does the ATS "allow courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States?" The policy judgment underlying the presumption against extraterritoriality (that Congress "take[s] account of the legitimate sovereign interests of other nations") is fully applicable to the question of the scope of the causes of actions that courts are authorized to recognize under the ATS. Indeed, application of the presumption is particularly warranted when, as here, the congressional statute contains *no* language creating a cause of action and courts are left to infer, based on the rather limited background information, what causes of action they are authorized to create.

Moreover, even if the presumption against extraterritoriality is ignored, the available evidence strongly supports Respondents' position that Congress did not envision federal court adjudicating ATS claims arising within the territory of other nations. Indeed, for the first two century's of our Nation's history, there is no record of a litigant seeking to invoke the ATS to raise law-of-nations claims based on events occurring overseas.

A. The Context Surrounding Adoption of the ATS Indicates That Congress Did Not Intend Extraterritorial Application of the Statute

The history leading up to adoption of the ATS in 1789 strongly suggests that Congress did not intend the ATS to apply extraterritorially. As *Sosa* recognized, the ATS was adopted in response to a decade-long concern that America's standing within the international community would suffer if it failed to uphold international law by failing to permit aliens a means of seeking redress in American courts for injuries inflicted on them by virtue of violations of the law of nations. *Sosa*, 542 U.S. at 715-19. Those concerns focused on injuries suffered by aliens while living in the United States. *Id.* Nothing in the pre-1789 history provides any support for the proposition that the ATS was intended to apply extraterritorially.

As *Sosa* explained, late 18th century legal scholars recognized only three offenses by individuals that violated the law of nations: offenses against ambassadors, violations of safe conducts, and piracy.

Sosa, 542 U.S. at 715 (quoting 4 William Blackstone, *Commentaries on the Laws of England* 68 (1769) (hereinafter "Blackstone")). It was those offenses that Congress apparently had in mind when it adopted the ATS. *Id.* at 719. Most importantly, Congress apparently was mindful of the need to create an adequate judicial forum when those offenses were committed *within the United States*. *Id.*[4]

Concern about creating an adequate forum for addressing violations of the law of nations arose during the American Revolution, "owing to the distribution of political power from independence through the period of confederation." *Id.* at 716. As the Court explained:

> The Continental Congress was hamstrung by its inability to "cause infractions of treaties, or of the law of nations to be punished." J. Madison, *Journal of the Constitutional Convention* 60 (E. Scott ed. 1893), and in 1781 the Congress implored the States to vindicate rights under the law of nations. In words that echo Blackstone, the congressional resolution called upon state legislatures to "provide expeditious, exemplary, and adequate punishment" for "the violation of safe conducts or passports, . . . of hostility against

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[4] The same Congress that enacted the ATS enacted a statute criminalizing the three offenses – assaults on ambassadors, violations of safe conducts, and piracy – that gave rise to the ATS. 1 Stat. 112, §§ 8, 25 (April 30, 1790). Like the ATS, the criminal statute was silent regarding whether it was to have extraterritorial application. However, although invoked by prosecutors many times, the statute was never invoked in cases involving actions taken within the territory of another nation.

> such as are in amity, . . . with the United States, . . . infractions of the immunities of ambassadors and other public ministers . . . [and] infractions of treaties to which the United States are a party." 21 *Journals of the Continental Congress* 1136-37 (G. Hunt ed. 1912). The resolution recommended that the States "authorize suits . . . for damages by the party injured, and for compensation to the United States for damages sustained by them from an injury done to a foreign power by a citizen." *Id.*, at 1137.

Sosa, 542 U.S. at 716. Quite plainly, the concern focused on misconduct committed by American citizens and others living within this country. The United States could only be said to have "sustained" damages by virtue of "an injury to a foreign power" if the injury occurred domestically; only then could the Nation's international esteem be thought to have suffered by virtue of having failed to prevent the injury to the alien/foreign power from occurring.

1. Offenses Against Ambassadors

Two events in the 1780s – both involving assaults on foreign government officials within the United States – heightened the "appreciation of the Continental Congress's incapacity to deal with" violations of the law of nations. *Id.* The first event, the Marbois Affair of May 1784, was widely recognized as a sign of the weakness of the national government. A "French adventurer, Longchamps, verbally and physically assaulted the Secretary of the French Legion," Mr. Marbois, in Philadelphia. *Id.* "The international

community was outraged and demanded that the Congress take action, but the Congress was powerless to deal with the matter. It could do nothing but offer a reward for the apprehension of de Longchamps so that he could be delivered to the state authorities." William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 491-92 (1986). The Marbois Affair "was a national sensation that attracted the concern of virtually every public figure in America. The Continental Congress's impotence when confronted with violations of the law of nations had been clearly established." *Id.* at 492-93. It was discussed on numerous occasions at the Constitutional Convention in 1787 and led to inclusion of Art. I, § 8, cl. 10 (granting Congress the power to "define and punish . . . Offences against the Law of Nations") and Art. III, § 2 (granting federal courts jurisdiction over "Cases affecting Ambassadors [and] other public Ministers and Consuls").

A similarly notorious incident occurred in 1787 . A New York constable entered the house of the Dutch ambassador and arrested one of his servants. This "affront" to diplomatic immunity "outraged" the ambassador, who protested to national government officials; but "[a]s in the Marbois Affair, the national government was powerless to act." Casto, at 494. The only sanction came at the hands of state courts in New York. *Id.* at 494 n.153. Thus, when Congress adopted the ATS in 1789 to create federal court jurisdiction over the three torts thought actionable as violations of the law of nations, the two best-known examples of torts made actionable thereby (Marbois and the Dutch

ambassador) both involved conduct that had taken place within the United States.

2. Violations of Safe Conducts

There is also no evidence that Congress contemplated extraterritorial application of the second tort covered by the ATS, violations of safe conducts. A "safe conduct" is "[a] privilege granted by a belligerent allowing an enemy, a neutral, or some other person to travel within or through a designated area for a specific purpose. . . . Blackstone makes it clear that a violation of safe conducts occurs when an alien's privilege to pass safely through the host nation is infringed and the alien consequently suffers injury to their 'person or property.'" *Taveras v. Taveraz*, 477 F.3d 767, 773 (6th Cir. 2007) (quoting Blackstone at 68-69). No 18th century legal commentator suggested that nations should be concerned about protecting the rights of aliens who were traveling through *other* nations. Rather, it was understood that a nation should be concerned with protecting the rights of aliens who had been granted a safe conduct while traveling through *that nation*.

Blackstone explained that violations of safe conducts "are breaches of the public faith, without the preservation of which there can be no intercourse between one nation and another." Blackstone, at 68-69. If a nation was to avoid war with the nation whose citizen's travel was interrupted, it was required to punish the individual responsible for the interruption. *Id.* Accordingly, new nations like the United States, in order to preserve peace, had a particular interest in

ensuring that redress was provided to those foreigners whose safe conducts were violated while traveling in the United States. Conversely, such nations would have had little interest in providing a judicial forum, for example, to a Frenchman who claimed that his safe conduct had been violated while he traveled through England. Interpreting the ATS to provide jurisdiction in federal court over such a cause of action would likely lead to conflict with England, the precise opposite from the intended purpose of providing redress for violations of safe conducts.

3. Piracy

The third tort covered by the ATS in 1789, piracy, quite clearly encompassed conduct that occurred outside the territorial jurisdiction of the United States. But while the federal courts exercised jurisdiction over piracy on the high seas, that jurisdiction did *not* include acts that would have been deemed piracy but for their occurrence within the jurisdiction of foreign nations.

Indeed, piracy was viewed in the 18th century as a unique offense precisely because it so often occurred outside the sovereign territory of *any* nation. Unless nations were willing to exercise jurisdiction over acts of piracy occurring outside their territory, many such acts would go unpunished. Thus, by general agreement of legal commentators, *all* nations were both entitled and obligated to punish piracy on the high seas. *See, e.g. United States v. Smith,* 18 U.S. (5 Wheat.) 153, 163 n.8 (1820) ("[A]s pirates are the enemies of the human race, piracy is justly regarded as a crime against the universal laws of society, and is everywhere punished with death.

. . . [E]very nation has a right to pursue, and exterminate them, without a declaration of war.") (quoting Azuni, part 2, c. 5, art. 3, Mr. Johnson's translation).

Importantly, not only was the 1790 piracy statute never invoked to cover alleged acts of piracy within the territory of a foreign nation, the Supreme Court interpreted that statute as not even applying to attacks on foreign ships by American citizens, where the attacking ship on which the Americans served was sailing under the authority of a foreign nation. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630-34 (1818). It is difficult to believe that the same Congress that adopted an anti-piracy statute of such limited scope nonetheless adopted an ATS statute for the purpose of extending the common law so as to regulate conduct within foreign nations.

B. The Language of the ATS Indicates That Congress Did Not Intend Extra-territorial Application

It is difficult to draw strong conclusions regarding the ATS's extraterritorial reach from the language of the statute, particularly given the absence of *any* statutory language that directly addresses the existence of ATS causes of action. What little evidence exists supports Respondents' position that no extraterritorial reach was intended.

Perhaps the strongest evidence in support of Respondents' position is the absence of language explicitly creating causes of action. While *Sosa*

concluded that the absence of such language did not preclude an inference that Congress intended to authorize some causes of action,[5] the absence of such language ought to weigh against granting a wide scope to those causes of action.

"The law of nations." The statutory language limiting the jurisdictional grant to tort claims alleging a "violation of the law of nations" also suggests a congressional intent to limit the scope of ATS actions. The 18th century law of nations focused to only a minor degree on offenses committed by individuals. The principal focus of the law of nations was "the general norms governing the behavior of national states with each other." *Sosa*, 542 U.S. at 714. "'Offenses against' the law of nations are 'principally incident to whole states or nations.'" *Id.* (quoting Blackstone at 68). Accordingly, by limiting federal court jurisdiction to suits alleging "violations of the law of nations," Congress was focusing on a very small subset of potential tort actions. Included therein were infringements on the rights of ambassadors, violations of safe conducts, and felonious behavior on the high seas (*i.e.* piracy). But the overwhelming majority of felonious

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[5] Despite the absence of explicit language of that sort, *Sosa* held that an intent to permit limited causes of action could be inferred, based on context. The Court held that: (1) Congress intended to permit ATS causes of action for the three law-of-nations offenses identified by Blackstone, because it assumed that those offenses were within the common law; and (2) Congress authorized federal courts, in the exercise of their "federal common law" powers, to consider whether to recognize additional offenses (beyond the original three) against the law of nations. 542 U.S. at 724, 729.

conduct committed on land, no matter how despicable (*e.g.*, murder, kidnaping, robbery, torture) was not actionable because it did not constitute an offense against "the law of nations." Use of the "law of nations" language was a strong indication of the restrictive scope of ATS jurisdiction. Moreover, the language suggests that Congress did not intend the ATS to apply extraterritorially, given that: (1) all of the incidents that prompted the 1789 Congress to adopt the statute involved law-of-nations violations that had occurred within the United States; and (2) as explained in Section II, Blackstone (whose views greatly influenced the Founding Generation) understood that laws adopted for the purpose of remedying offenses against the law of nations did not apply to offenses that occurred in another nation.

"Civil Action by an Alien." The ATS grants jurisdiction to civil actions filed by an "alien." The use of the word "alien" is significant. In the 18th century, the word "alien" had a narrower meaning than it does today. *See* M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 BERK. J. INT'L L. 316 (2009). In modern usage, the word "alien" is deemed largely synonymous with "foreigner" and is used to describe anyone who is not a citizen of the United States. In the 18th century, however, the word "alien" generally had a more restrictive meaning; it referred to a non-citizen living in the United States on a full-time basis. *Id.* The ATS as passed by the Senate established jurisdiction for a "civil action by a foreigner." However, in June 1789, the House amended the ATS (§ 9 of the Judiciary Act of 1789) to change the word "foreigner" to "alien." *Id.* at

317-18. The use of the more restrictive word "alien" in the ATS may indicate that Congress intended to restrict jurisdiction to suits filed by non-citizens living full time in the United States. While it is theoretically possible that an ATS suit filed by a U.S.-resident non-citizen might involve an injury suffered overseas before the non-citizen arrived in this county, it is a fair supposition that a law-of-nations tort suit filed by an alien who has been living in the United States is more likely to involve incidents that took place in the United States than to involve incidents that took place in a foreign country. Accordingly, Congress's last-minute decision to change "foreigner" to "alien" is at least some indication that Congress anticipated that ATS claims would be limited to events occurring within the United States.[6]

C. The Transitory Tort Doctrine Does Not Suggest That Congress Anticipated That the ATS Would Be Applied Extraterritorially

In support of her extraterritoriality argument, Kiobel asserts, "The First Congress presumed the

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[6]*Amici* note that only one statute adopted by the First Congress, other than the Judiciary Act of 1789, used the word "alien." That March 1790 statute, which established "a uniform Rule of Naturalization," limited citizenship to "any Alien . . . who shall have resided within the limits and under the jurisdiction of the United States for the term of two years." *Id.* at 372-73. That other usage of "alien" clearly applied only to non-citizens residing in this country. We also note that Article III, § 2 of the Constitution, which sets forth the federal courts' diversity jurisdiction, makes no mention of "aliens" but rather uses the broader term "foreign" (suits "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects").

transitory tort doctrine applied to torts in violation of the law of nations." That argument is based on a misunderstanding of the transitory tort doctrine; that doctrine is unrelated to the issue of whether Congress intended *its* law – the ATS – to apply extraterritorially.

By the 18th century, it was well accepted under English law that many torts were "transitory." That is, if a defendant committed an act that was tortious under the laws of the jurisdiction in which the act occurred, the defendant's tort liability traveled with him, and he could be sued for the tort in any jurisdiction in which he could be found. *See, e.g., Mostyn v. Fabrigas* (1774) 98 Eng. Rep. 1021 (K.B. 1030); 1 Cowp. 16.[7] A transitory tort case was not an instance in which the forum court was applying its law extraterritorially to acts that occurred in other jurisdictions. Rather, as the name "transitory" implies, it was a case in which the cause of action traveled with the defendant into his new jurisdiction of residency. *See* 3 Blackstone at 384 ("All over the world, actions transitory follow the person of the defendant."). In other words, the forum court simply applied the law of the jurisdiction in which the tortious conduct occurred. *See, e.g., Blad's Case*, 3 Swanst. 603, 36 Eng. Rep. 991 (P.C. 1673) (holding that "whatever was law in Denmark would be law in England in this case" where a Danish citizen seized an

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[7] Some torts (principally, actions involving real property) were classified as "local" torts and could only be maintained in the jurisdiction where the property was located. Much of the case law from that era involved disputes regarding whether a tort should be deemed "transitory" or "local." *See, e.g., Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811)(No. 8411) (holding that trespass on land should be deemed a "local" tort).

Englishman's estate in Iceland). A faithful application and enforcement of another jurisdiction's laws would have been unlikely to offend the other jurisdiction.

The transitory tort doctrine provides no support for Kiobel's contention that the ATS should be applied extraterritorially to events occurring in other countries. As *Sosa* recognized, Congress created American law when it enacted the ATS. As the past three decades of ATS litigation well illustrate, other countries are highly likely to take offense if U.S. courts seek to enforce American understanding of the law of nations to events occurring in those other countries – notwithstanding Kiobel's protestations that U.S. courts are only being asked to apply "universal" law to which the other countries cannot reasonably object. Accordingly, 18th century acceptance of the transitory tort doctrine provides scant evidence that the First Congress would have intended the ATS to apply extraterritorially.

In an effort to minimize the difference between the transitory tort doctrine and extraterritorial application of the ATS, Kiobel and some of her supporting *amici* contend that 18th century English courts regularly applied forum law in transitory tort cases. That assertion is without any factual basis. Indeed, Lord Mansfield stated categorically in *Mostyn* that the law of the jurisdiction in which the act occurred controls, and that a defendant is entitled to raise any defense available in that jurisdiction, even if the defense would not normally be available under English law. *Mostyn*, 98 Eng. Rep. at 1029 ("For whatever is a justification in the place where the thing is done ought to be a justification where the thing is tried."). U.S. case

law similarly acknowledged that *lex loci delecti commissi* (the law of the place where the tort was committed) governed transitory torts arising in a foreign country but filed in an American court. *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120 (1904).

Professor Brainerd Currie, a leading 20th century legal scholar on conflict of law issues, noted a trend within the past century away from requiring courts to apply the law of the place of the wrongdoing in tort actions. Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958). Professor Currie nonetheless recognized that 18th century English law adhered strictly to *lex loci delecti commissi* in transitory tort cases. *Id.* at 967-68. Accordingly, the widespread acceptance of the transitory tort doctrine by the 1780s would not have caused Congress to deem extraterritorial application of the ATS to be similarly unobjectionable.

Finally, just as 18th century courts recognized that some "local" torts were (due to their subject matter) inappropriate for adjudication outside of the jurisdiction in which the wrongdoing occurred, so too would 18th century courts have deemed two of the three recognized law-of-nations offenses (violations of safe conducts and infringements on the rights of ambassadors) to be "local" in character and inappropriate for adjudication outside of the forum where the offense occurred. Unlike the typical transitory tort claim, safe conduct and ambassador claims are likely to be intimately bound up with the conduct of the host government. For example, the terms and extent of any safe conduct granted by the

host government to a foreign citizen would be essential evidence in any case alleging that the foreigner's safe conduct rights were violated. If the French government denied that it ever offered a safe conduct to an English citizen traveling through France, it would have been understandably perturbed if an American court agreed to hear the Englishman's ATS claim (perhaps filed against a French policeman present in the United States) and to adjudicate precisely what assurances were provided to him by the French government. It is inconceivable that Congress wanted to entangle the U.S. in disputes of that nature. Instead, Congress would have viewed the dispute as one that should be resolved among the non-citizen parties and their respective governments. Claims alleging infringement on the rights of ambassadors would likely raise similar concerns; *e.g.*, had the French government actually accepted the diplomatic credentials of the Englishman who alleged that his rights had been infringed?

D. Post-Enactment Events, Including the 1795 Bradford Opinion, Confirm That Congress Did Not Intend the ATS To Be Applied Extraterritorially

In support of her argument that the Founders understood that ATS causes of action could be applied to events in other nations, Kiobel relies on a 1795 opinion issued by Attorney General William Bradford. 1 Op. Att'y Gen. 57 (1795). She asserts, "Bradford found that a foreign plaintiff could bring tort claims under the ATS against perpetrators of an attack within the territory of the British colony of Sierra Leone." Pet. Supp. Br. 31. That assertion misinterprets the Bradford

opinion and is based on a misunderstanding of the law of nations as it was understood in the 18th century.

The opinion was written following a formal request from the British government that the United States take action against American citizens who played a prominent role in a French attack on Sierra Leone. Appendix A to Pet. Suppl. Br. (June 25, 1795 letter from British government). The letter called on the United States to "restrain in future such illegal and piratical aggressions" and to punish the Americans involved. Appendix A, at A-3. During the attack, the Americans are alleged to have plundered Freetown, the Sierra Leone capital, and to have captured several British ships on the high seas off the coast of Sierra Leone.

Bradford's somewhat cryptic opinion is not a model of clarity. On the whole, however, the opinion appears more favorable to Respondents' position than to Kiobel's. In particular, the opinion cannot plausibly be read as stating that victims could maintain an extraterritorial ATS cause of action based on the plundering of Freetown.

Bradford concluded that the United States lacked authority to bring criminal charges against Americans involved in the attack: insofar "as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts." *Id.* at 58. He added, however, that victims could seek compensation by filing a civil suit under the ATS: "there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of

the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." *Id.* at 59.

The opinion is ambiguous with respect to several key issues. First, although the opinion states that events occurring "in a foreign country . . . are not within the cognizance of our courts," it is unclear whether the statement applies broadly to all judicial proceedings or (as asserted by Kiobel) only to criminal proceedings. Second, when the opinion states that victims could maintain an ATS lawsuit for damages incurred as a result of "these acts of hostility," it is not clear what "acts of hostility" Bradford was referring to. Respondents assert that the "acts of hostility" referred to by Bradford included only the acts of piracy on the high seas.[8] Third, in discussing the ATS, Bradford noted that the ATS applies both to violations of the law of nations and to violations of treaties of the United States yet did not specify the branch of the ATS under which he envisioned a civil suit would proceed. The Jay Treaty between the United States and Great Britain was ratified only weeks before Bradford wrote his opinion, and *Sosa* speculated that Bradford's opinion may have been based on an assumption that any ATS lawsuit would allege violations of a federal treaty. 542

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[8] A number of federal appellate judges agree with Respondents, including the Second Circuit panel in this case. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 142 n.44 (2d Cir. 2010) (concluding that Bradford determined that the ATS provided an avenue for relief only with respect to attacks that occurred on the high seas); *Doe v. Exxon Corp.*, 654 F.3d 11, 80 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (same).

U.S. at 71.[9]

Those ambiguities limit the usefulness of the Bradford opinion as a guide to contemporary understandings of the ATS. Moreover, one glaring weakness in Kiobel's argument undercuts any use which she might otherwise have been able to make of the Bradford opinion. The facts alleged in the Sierra Leone case make clear that the plundering of Freetown did *not* constitute a violation of the law of nations. As *Sosa* notes, late 18th century legal scholars recognized only three offenses by individuals under the law of nations: (1) violations of safe conducts; (2) interference with the rights of ambassadors; and (3) piracy. The plundering of a city by individuals not in a state of war with the city is undoubtedly a serious felony. But no legal scholar would have deemed such conduct a violation of the law of nations; it does not fall within any of the three paradigms. While reasonable people can disagree regarding the precise conclusions that Bradford was intending to convey, he could not possibly have been asserting the conclusion advocated by Kiobel: that Sierra Leone victims could sue to recover damages incurred due to law-of-nations violations committed during the plunder of Freetown. Bradford could not have intended to convey that meaning because, in a era that preceded the emergence of international human rights law by more than 150 years, he would have understood that the plundering of Freetown did not violate the law of nations.

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[9] Whether a treaty could be applied extraterritorially in an ATS action would, of course, depend on the precise terms of the treaty at issue.

Other events in the post-1789 era provide a clearer indication of American aversion to intervention (including judicial intervention) in events occurring overseas. The guiding principle of U.S. foreign policy during the Washington Administration was to remain neutral in the ongoing wars between France and England. Most famously, Washington's April 22, 1793 Proclamation of Neutrality declared an official policy of neutrality in the European wars.

This Court's maritime decisions from that era repeatedly interpreted federal law in a manner that ensured the least possible conflict with foreign powers. *See, e.g. United States v. Peters*, 3 U.S. (3 Dall.) 121 (1795) (rejecting the claims of a Philadelphia merchant that a French ship violated the law of nations by capturing his ship and taking it to France for prize adjudication); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795) (upholding the claim of a Dutch citizen that an American citizen had unlawfully captured (and claimed as a prize) the Dutchman's ship, even though the American claimed to have been commissioned by France, which was at war with the Netherlands). Many legal commentators have viewed *Peters* and *Talbot* as evidence that this Court went to great lengths in its early years to interpret federal law in a manner that would avoid conflict with foreign countries. *See, e.g.*, Anthony J. Bellia Jr. and Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 59-60 (2009). *See also The Apollon*, 22 U.S. 362, 370 (1824) (holding that even though a French ship had passed through U.S. waters on its way to Spanish Florida, American officials acted wrongfully in seizing the ship while in Spanish Florida, and stating, "The

laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens.").

Amici respectfully submit that the exercise of such caution requires the federal courts to decline to recognize *any* extraterritorial application of ATS claims in the absence of a directive from Congress that they do so. Because the conduct of which Kiobel complains took place entirely within Nigeria and had no impact on any American citizens, dismissal of Kiobel's ATS claims should be affirmed.

II. 18TH CENTURY LEGAL SCHOLARS RECOGNIZED THAT STATUTES ENFORCING THE LAW OF NATIONS WERE NOT TO BE ENFORCED EXTRATERRITORIALLY

American leaders were not the only ones who opposed recognition of a cause of action in the courts of one country for violations of the law of nations occurring within the territory of another sovereign nation. Leading 18th century legal scholars, including both Blackstone and Vattel, expressed no support for such extraterritorial enforcement of the law of nations.

A. Blackstone Did Not Believe That the Law of Nations Permitted Tort Actions Arising from Extraterritorial Activities

Sosa confirms that the 1789 Congress looked to William Blackstone for guidance regarding the circumstances under which individuals could file tort

actions for violations of the law of nations. In support of his assertion that the law of nations recognized causes of action for violations of safe conducts, infringement of the rights of ambassadors, and piracy, Blackstone noted that English statutes proscribed all three of those offenses. Blackstone at 68 (the three offenses were "animadverted on as such by the municipal law of England"). Importantly, those English statutes did not apply extraterritorially – they applied only to conduct that occurred in the British realms or on the high seas. Given Blackstone's belief that those statutes were the embodiment of the law of nations, he most certainly did not believe that the law of nations authorized English courts to hear tort actions arising in foreign countries. Accordingly, there is no reason to believe that the 1789 Congress, when it adopted a statute intended to create jurisdiction for the tort actions described by Blackstone, sought to authorize tort actions vastly greater in scope than the ones contemplated by Blackstone.

When interpreting the ATS, it is important to bear in mind 18th century understandings regarding the common law and the law of nations. Common law was not then viewed (as it is now) as a set of rules created by judges based on the cumulative wisdom gained through centuries-long experience dealing with recurring factual situations. Rather, "the accepted conception was of the common law as a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." *Sosa* at 725. Like other 18th century English scholars, Blackstone viewed "the law of nations" as an aspect of the common law; he did not view it as a restatement of rules widely accepted by the

govern-ments of Europe but rather as a "system of rules, deducible by natural reason." Blackstone at 67. Thus, when he declared that there existed three offenses against the law of nations that could be charged against individuals, he meant thereby that the existence of a prohibition against those offenses could be deduced from the principle "that different nations ought in times of peace to do one another all the good they can; and, in time of war, as little harm as possible, without prejudice to their own real interests." *Id.*

Because Blackstone viewed the law of nations as an aspect of the common law, in his view it had already been adopted in England "in its full extent by the common law." *Id.* When Blackstone asserted that his three law-of-nations offenses had been "animadverted on as such by the municipal laws of England," *id.* at 68, he meant thereby that English statutes gave official recognition to offenses that, even prior to adoption of the statutes, were subject to sanction under the common law. Accordingly, to gain insight into whether Blackstone believed that the law of nations required England to apply its laws extraterritorially, it is helpful to look at the scope of the "municipal laws of England" that Blackstone believed were an accurate reflection of the common law. Tellingly, none of those statute had extraterritorial application.

Violations of Safe Conducts. To support his assertion that violations of safe conducts were offenses against the law of nations, Blackstone cited a series of 15th century statutes culminating in a 1452 statute, 31 Hen. VI c. 4, that "remain[ed] in full force" at the time that Blackstone wrote. Blackstone at 69-70. The 1452

statute stated:

> [I]f any of the king's subjects attempt or offend, upon the sea, or in any port within the king's obeysance, against any stranger in amity, league, or truce, or under safe conduct; and especially by attaching his person, or spoiling, or robbing him of his goods; the lord chancellor, with any justice of either the king's bench or common pleas, may cause full restitution and amends to be made to the party injured.

31 Hen. VI c. 4 (quoted in Thomas Walter Williams, LAW DICTIONARY (Gale and Fenner, London, 1816)).

By its plain terms, the 1452 statute did not apply extraterritorially. Rather, it applied only to conduct occurring on the high seas or "in any port within the king's obeysance." Moreover, it did not attempt to regulate the conduct of foreign citizens; rather, only British subjects could be sued in tort.

Offenses Against Ambassadors. To support his assertion that offenses against ambassadors were offenses against the law of nations, Blackstone stated that Parliament adopted a statute in 1708 to "more effectively enforce the law of nations" with respect to ambassadors. Blackstone at 70 (citing 7 Ann. c. 12). Section 3 granted immunity from civil process to "any ambassador or other publick minister of any foreign prince or state authorized or received as such by her Majesty [or] her heirs or successors." Section 4 declared that violations of Section 3 "shall be deemed violat[ions] of the law of nations" and that violators

"shall suffer such pains (penalties and corporal punishment)" as the courts "shall judge to fit to be imposed and inflicted."[10] The Act was not intended to have extraterritorial effect; it did not apply to offenses against just any ambassador but rather only those foreign ambassadors or public ministers who were "authorized or received as such" in England by the Queen.

Piracy. To support his assertion that piracy was an offense against the law of nations, Blackstone cited a series of piracy statutes, including 11 Will. c. 7, the Piracy Act of 1698. Blackstone at 72. Section VII of the Act provided:

> If any of his Majesties . . . Subjects . . . shall commit any Piracy or Robbery or any Act of Hostility against other His Majesties Subjects upon the Sea under Colour of any Commission from any Forreigne Prince or Pretence of Authority from any person whatsoever such Offender and Offenders and every of them shall be deemed adjudged and taken to be Pirates Felons and Robbers.

Blackstone went on to define piracy as follows: "The offense of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there." *Id.* at 72 (citing 1 Hawk. P.C. 100). In other words, since piracy by

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[10] Sections 3 and 4 of the Act are quoted in *United States v. Enger*, 472 F. Supp. 490, 538 n.8 & n.9 (D.N.J. 1978).

definition was limited to acts committed upon the high seas, Blackstone could not have believed that the law of nations provided a right of action for attacks by "pirates" in a foreign country (for example, an attack on a ship sitting in a foreign port).

In sum, Blackstone's understanding of the law of nations provides strong support for the conclusion that Congress did not intend the ATS to apply extraterritorially. There is no reason to believe that Congress, in adopting the ATS, intended thereby to authorize the federal courts to entertain common law suits based on actions within a foreign country, if the legal scholar to whom Congress looked for guidance regarding the meaning of the law of nations did not believe that the law of nations authorized such suits.

B. Vattel Was Skeptical of a Nation's Efforts to Regulate Conduct Occurring Outside Its Territory

Kiobel and a number of her supporting *amici* cite the writings of Swiss legal scholar Emmerich de Vattel to support their position that the ATS should be applied extraterritorially. To the contrary, Vattel's writing repeatedly expresses support for the equality of sovereigns and cautions nations against conduct that would interfere with the internal affairs of other nations.

Kiobel cites Vattel for the proposition that a nation ought to be permitted to exercise jurisdiction over "villains" who "declare themselves the enemies of the human race," regardless whether those villains

committed crimes within the nation's territory. Pet. Suppl. Br. at 20 (citing 1 Emmerich de Vattel, *The Law of Nations*, ch. 19, § 233 (T. & J.W. Johnson eds., Joseph Chitty trans., 1852)). The quoted text makes clear, however, that the "villains" that Vattel had in mind were pirates. Permitting a nation to punish pirates for their criminal misconduct outside the nation and on the high seas is an application of extraterritoriality that was well accepted by Blackstone and the 1789 Congress; nothing in the text suggest that Vattel condoned a nation's exercise of jurisdiction over acts carried out within the territory of another nation. Indeed, the text provides that when a nation comes into custody of one of these "villains," it should accede to any extradition request from the country where the "villain" committed his crimes, rather than conducting its own trial. *Id.* Moreover, Vattel states as a "general" rule that a nation ought "to be confined to the punishment of crimes committed in its own territories." *Id.*

That "general" rule is consistent with Vattel's belief that "no nation has a right to interfere in the government of another state." 2 Vattel, ch. 4, § 54. He explained:

> It is an evident consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that no state has the smallest right to interfere in the government of another. Of all the rights that can belong to a nation, sovereignty is, doubtless, the most precious, and that which other nations ought to the most scrupulously to respect, if they would not do her an injury.

Id. Extraterritorial application of the ATS, such that American courts apply U.S. law to events that occur in foreign countries and involve foreign plaintiffs and defendants, is inconsistent with Vattel's teaching that nations ought to "respect" the sovereignty of other nations.

Vattel deemed it important that nations not provide unwarranted protection to a citizen who has injured another nation or one of its citizens. But even then, Vattel saw no need for a nation to grant redress to the injured citizen by providing him with a civil cause of action. According to Vattel, a nation can avoid being deemed responsible for the action of its citizen in a variety of ways, including extraditing the citizen to the offended country. *Id.*, § 77. Moreover, a nation bears no responsibility to the nation whose citizens was injured unless and until the other nation makes a formal request for redress. *Id.*, §§ 75-76.

Vattel's rule requiring a formal request for redress makes eminent foreign relations sense. It ensures that the nation contemplating applying its laws extraterritorially does not do so without the cooperation of the nation where the wrongful act took place. Such a rule, if applied to Kiobel's claims, would require immediate dismissal of those claims, given Nigeria's repeated objections to the U.S. court's continued exercise of jurisdiction in this case.

CONCLUSION

Amici curiae request that the Court affirm the judgment below.

Respectfully submitted,

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